APPENDIX

ORDER OF THE COURT OF APPEALS OF MARYLAND DENYING PETITION

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 385

September Term, 1982

(No. 1494, September Term, 1981 Court of Special Appeals)

ROBIN J. PECORA

v.

STATE OF MARYLAND

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert C. Murphy
Chief Judge

Date: November 5th, 1982.

OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 1494

September Term, 1981

ROBIN J. PECORA

VS.

STATE OF MARYLAND

MacDaniel
Bishop
Bowen, Jr., Perry G.
(Specially Assigned)
JJ.

PER CURIAM

FILED: August 10, 1982

The Appellant was convicted in a Non-Jury trial by the Criminal Court of Baltimore City (Bell, J., presiding) of driving while impaired, and negligent driving. From the sentences imposed he has taken this appeal.[1]

Appellant raises the following questions:

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1. Appellant was also convicted of and sentenced for fleeing or eluding the police but did not appeal that conviction and sentence.

Opinion

1. Was the evidence sufficient to sustain Appellant's conviction for driving while impaired?

2. Should the conviction for negligent driving be merged into the conviction for driving while impaired?

3. Did the Trial Court commit error with respect to the conduct of the Prosecutor at the time of sentencing?

Maryland Rule 1086 requires this Court in cases tried by the lower Court without a jury to "—review the case upon both the law and the evidence but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the creditability of the witnesses."

There was evidence in this case tending to show that the Defendant was trying to get in a barroom after it had closed. He made such a disturbance in claiming that a shirt he wanted was inside that the people in the bar called the police. At that point no shirt was found, he smelled of alcohol and impressed the officer as being affected by alcohol. Suspecting that he may have been the driver of a car leaving the area shortly thereafter the policeman *followed* it and after observing some questionable movements, stopped the car. When asked for his license, Appellant, an attorney, gave the officer first a business card, then his driving record and finally his license. After he was ordered out of the car he was staggering slightly. When requested to walk on the sidewalk he took about 2 steps got back into his car and drove it at high speed directly into the nearest of a line of three cars parked along the curb about two car lengths in front of his car. When his car stopped and rebounded from the first striking he drove it into the parked car a second time.

Opinion

In *State v. Rush*, 289 Md. 230 (1981) the Court of Appeals said:

> "Of course, due process requirements mandate that a criminal conviction not be obtained if the evidence does not reasonably support a finding of guilt beyond a reasonable doubt. *Tichnell v. State*, 287 Md. 697, 415 A. 2d 830 (1980). However, as the Supreme Court made clear in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the reviewing court does not ask itself whether it believes that the evidence established guilt beyond a reasonable doubt; rather, the applicable standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

If Judge Bell believed, as he obviously did, the testimony of the police officers, there was overwhelming evidence to support his finding of guilty on the charge of driving while impaired.

The argument by Appellant that the officer did not have authority to stop Appellant, detain him and request him to walk on the sidewalk is frivolous. The authorities cited by Appellant are not relevant to any issue of sufficiency of the evidence on this charge. The answer to the first question raised by the Appellant is, Yes!

The test for merger in Maryland is stated by the Court of Appeals in *Newton v. State*, 280 Md. 260 at pg. 268 (1977).

Opinion

> "Thus, under both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test. If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited."

Regardless of the actual evidence used to establish the facts the test is whether a separate fact or element of the crime must be proven for each crime being considered. Impairment by alcohol or drugs is a fact or element evidence of which is required to prove the charge of driving or attempting to drive while impaired. It is not an element or fact evidence of which is required to prove negligent driving. Actual operation of a vehicle in a reckless and wanton manner is a fact or element of evidence proof of which is required to prove the crime of reckless driving. No such fact or element is required to be proven in a case of driving or attempting to drive while impaired. Thus each offense requires proof of a fact or element not required to prove the other and they do not merge. The answer to the second question raised by the Appellant is No!

The Appellant contends that the actions of the prosecutor at sentencing were improper and require a new trial. The authorities cited by Appellant both relate to conduct of prosecutors in jury trials which took place before the verdict. A review of the record at sentencing shows that the Appellants contentions are groundless. The prosecutor had a right and a duty to bring to the Court's attention any matter which could be considered in determining the sentence. The Court at sentencing is not limited to the evidence

admitted during the trial but may consider anything having a bearing on the sentence so long as the defense is informed of it and afforded an opportunity to rebut or explain it.

Other than the maximum limits prescribed by law and the constitutional prohibitions against cruel and unusual punishments the only restraint on sentencing courts is "that the sentencing judge not be motivated by ill-will, prejudice or other improper considerations." *Kaylor v. State*, 285 Md. 66 (1979). Appellant here makes no such claim and the record at sentencing shows affirmatively that none could be made. The answer to the third question raised by the Appellant, is No!

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT

RELEVANT STATUTES

Annotated Code of Maryland, §13-409:

"§13-409. Registration card to be carried and exhibited on demand of police officer.

(a) *In general.* — At all times, each registration card shall be carried:

(1) In the vehicle to which it refers; or

(2) By the individual driving or in control of the vehicle, who shall display it, on demand, to any police officer who identifies himself as such.

(b) *Exception.* — This section does not apply if the card is being used to apply for the transfer of registration of the vehicle. (An. Code 1957, art. 66½, §3-409; 1977, ch. 14, §2.)"

Transportation, §16-112:

"§16-112. License to be carried and exhibited on demand; giving of false name prohibited.

(a) *Possession and display of license; writing sample.* —(1) In this subsection, 'display' means the manual surrender of the licensee's license into the hands of the demanding officer for inspection.

(2) Each individual driving a motor vehicle on any highway in this State shall:

(i) Have his license with him;

(ii) Display the license to any uniformed police officer who demands it; and

(iii) If requested by the officer, sign his usual signature in the presence of the officer so that the officer may determine whether he is the licensee.

(b) *Giving false name.* —A person may not give the name of another person or give a false or fictitious name to any uniformed police officer who is attempting to determine the identity of a driver of a motor vehicle. (An. Code 1957, art. 66½, §6-112; 1977, ch. 14, §2.)"

Annotated Code of Maryland, §21-901.1:

"§21-901.1. Reckless and negligent driving.

(a) *Reckless driving.* — A person is guilty of reckless driving if he drives a motor vehicle:

(1) In wanton or willful disregard for the safety of persons or property; or

(2) In a manner that indicates a wanton or willful disregard for the safety of persons or property.

(b) *Negligent driving.* — A person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.

Relevant Statutes

(An. Code 1957, art. 66½, §11-901; 1977, ch. 14, §2.)

Annotated Code of Maryland, §21-902:

"21-902. Driving while intoxicated, ability impaired, or under the influence.

(a) *Driving while intoxicated.* — A person may not drive or attempt to drive any vehicle while intoxicated.

(b) *Driving while ability impaired by alcohol.* — A person may not drive or attempt to drive any vehicle while his driving ability is impaired by the consumption of alcohol.

(c) *Driving while under influence of drugs or drugs and alcohol.* — (1) A person may not drive or attempt to drive any vehicle while he is so far under the influence of any drug, any combination of drugs, or any combination of drugs and alcohol that he cannot drive a vehicle safely.

(2) It is not a defense to any charge of violating this subsection that the person charged is or was entitled under the laws of this State to use the drug, combination of drugs, or combination of drugs and alcohol, unless the person was unaware that the drug or combination would make him incapable of safely driving a vehicle.

(d) *Driving while under influence of controlled dangerous substance.* — A person may not drive or attempt to drive any vehicle while he is under the influence of any controlled dangerous substance, as that term is defined in Article 27, §279 of the Code, if the person is not entitled to use the controlled dangerous substance under the laws of this State. (An. Code 1957, art. 66½, §11-902; 1977, ch. 14, §2.)

Annotated Code of Maryland, §21-904:

"21-904. Fleeing or eluding police.

(a) *Scope of section.* — This section applies when a police officer gives a signal to stop, whether by hand, voice, emergency light, or siren, if:

(1) The police officer is in uniform, prominently displaying his badge or other insignia of office; and

(2) The police officer, when in a vehicle, is in a vehicle appropriately marked as an official police vehicle.

(b) *Driver to obey signal.* — If given a visual or audible signal by a police officer to stop his vehicle, the driver of a vehicle may not attempt to elude the police officer, whether:

(1) By willfully failing to stop his vehicle;

(2) By fleeing on foot; or

(3) Otherwise, by any other means. (An. Code 1957, art. 66½, §11-904; 1977, ch. 14, §2.)"